Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
Petitioners,

v.

ALABAMA POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Sherman Act, contracts in restraint of trade are illegal. Contracts to divide territories are *per se* illegal. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). However, under the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943), a state can immunize some private conduct from antitrust attack as an act of the state as long as (i) the state does not merely ratify private agreements in restraint of trade and (ii) the state clearly articulates its policy curtailing competition and actively supervises the private conduct. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *FTC v. Ticor Ins. Co.*, 112 S. Ct. 2169 (1992). Against this background, this case presents the following questions:

1. Should the decisions below, which uphold state statutes that ratify private contracts dividing retail electric territories, be summarily reversed as contrary to this Court's decision in *FTC v. Ticor*, 112 S. Ct. 2169 (1992), which reversed the opinion of the Third Circuit Court of Appeals in that case and displaced the First Circuit Court of Appeals' decision in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), particularly because the district court relied upon both of these appellate decisions and the Eleventh Circuit Court of Appeals affirmed?

2. Should the decisions below be summarily reversed as contrary to the principles announced by this Court in *Ticor*, *Patrick v. Burget*, 489 U.S. 94 (1988), and *California Retail Dealers Ass'n v. Midcal*, 445 U.S. 97 (1980), because the decisions below provide for no state supervision of private, anticompetitive conduct?

If the opinions of the court of appeals are not vacated summarily, this case presents the following questions for review:

1. If a state grants antitrust exemptions by legislation, may the state give authority to private parties to violate

federal antitrust laws by ratifying private territorial agreements, contrary to the principles announced in *Parker v. Brown*, 317 U.S. 341, 351-52 (1943), that a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful?"

2. May a state authorize, by legislation, both overall territorial agreements and separate individual private territorial agreements and the conduct taken pursuant to those agreements, where

> (a) the state had no involvement in formulating either the overall agreements or the individual, separate territorial contracts, some of which were formed decades earlier,
>
> (b) the state had no overall economic or other policy curtailing competition as evidenced by, among other things, the fact that some of the individual territorial contracts conflicted with the overall agreement, and
>
> (c) the state has not supervised the implementation of either the overall or individual agreements, some of which expressly grant the parties to the agreements discretion in allocating territories or customers?

3. Where a state legislature undertakes to exercise supervisory authority typically delegated to regulatory bodies is the legislature held to the same standard of active supervision as a regulatory agency created by it would be?

4. Should the Court revisit the scope of the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943)?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit and herein include the following:

Petitioners

The City of Alexander City, Alabama
The City of Andalusia, Alabama
The City of Bessemer, Alabama
The City of Brundidge, Alabama
The City of Courtland, Alabama
The City of Decatur, Alabama
The City of Dothan, Alabama
The City of Evergreen, Alabama
The City of Fairhope, Alabama
The City of Florence, Alabama
The City of Hartford, Alabama
The City of Huntsville, Alabama
The City of Lafayette, Alabama
The City of Lanett, Alabama
The City of Lincoln, Alabama
The City of Opelika, Alabama
The City of Piedmont, Alabama
The City of Robertsdale, Alabama
The City of Tuscumbia, Alabama
The Electric Board of Guntersville, Alabama
The Electric Board of the City of Muscle Shoals, Alabama
The Electric Board of the City of Luverne, Alabama
The Electric Board of the City of Hartselle, Alabama
The Fort Payne [Alabama] Improvement Authority
The Municipal Utilities Board of Albertville, Alabama
The Scottsboro [Alabama] Electric Power Board
The Utilities Board of the City of Sylacauga, Alabama
The Utilities Board of the City of Tuskegee, Alabama
The Utilities Board of the City of Opp, Alabama
The Utilities Board of the City of Foley, Alabama
The Utilities Board of the City of Cullman [Alabama], Inc.

Respondents:

Alabama Electric Cooperative, Inc.
Alabama Power Company
Alabama Rural Electric Association of Cooperatives
Arab Electric Cooperative, Inc.
Baldwin County Electric Corporation
Black Warrior Electric Membership Corporation
Central Alabama Electric Cooperative
Cherokee Electric Cooperative
Clarke-Washington Electric Membership Corporation
Coosa Valley Electric Cooperative, Inc.
Covington Electric Cooperative, Inc.
Cullman Electric Cooperative
Dixie Electric Cooperative
Franklin Electric Cooperative
Joe Wheeler Electric Membership Corporation
Marshall-DeKalb Electric Cooperative
North Alabama Electric Cooperative
Pea River Electric Cooperative
Pioneer Electric Cooperative, Inc.
Sand Mountain Electric Cooperative
South Alabama Electric Cooperative, Inc.
Southern Pine Electric Cooperative
Tallapoosa River Electric Cooperative
Tombigbee Electric Cooperative, Inc.
Wiregrass Electric Cooperative, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
SUMMARY OF ARGUMENT	15
I. THE DECISIONS BELOW ARE CLEARLY CONTRARY TO THE SHERMAN ACT AND THE RECENT DECISIONS OF THIS COURT; THEREFORE, A GRANT OF *CERTIORARI* AND SUMMARY DISPOSITION IS WARRANTED AND REQUESTED	18
II. IF THE ELEVENTH CIRCUIT IS NOT SUMMARILY REVERSED, THE COURT SHOULD REVIEW WHETHER STATES MAY PROVIDE PRIVATE PARTIES WITH ANTITRUST PROTECTION BY PASSING LEGISLATION THAT DOES NOT CONFORM TO THE *PARKER, MIDCAL* AND *TICOR* TESTS; ALTERNATIVELY, THE COURT SHOULD RE-EXAMINE THE SCOPE OF THE *PARKER* STATE ACTION DOCTRINE	22
CONCLUSION	30
APPENDICES A-M	*Bound Separately*

TABLE OF AUTHORITIES

CASES — Page

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 12
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... *passim*
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) .. 16, 19, 20
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 18, 28, 29
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), *overruled in part on other grounds, Hallie v. Eau Claire*, 471 U.S. 34 (1985) 18-19, 20
City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) 27
DFW Metro Line Servs. v. Southwestern Bell Tel. Corp., 988 F.2d 601 (5th Cir. 1993), *cert. denied sub nom. United States Metroline Servs. v. Southwestern Bell Tel. Co.*, 114 S. Ct. 183 (1993) 25
Dixie Elec. Coop. v. Citizens of Ala., CV-84-575-PR (Circuit Court of Montgomery County, Ala.), *vacated by* 789 F.2d 852 (11th Cir. 1986) 3-4, 10
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 12, 16
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) 12, 15, 20, 26
Gainesville Utils. Dep't v. Florida Power & Light Co., 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978) 18, 28
Hoover v. Ronwin, 466 U.S. 558 (1984) 12, 24, 25
Municipal Utils. Bd. of Albertville v. Alabama Power Co., 21 F.3d 384 (11th Cir. 1994) ..... *passim*
Municipal Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991) ..... *passim*
Municipal Utils. Bd. of Albertville v. Alabama Power Co., No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Mar. 4, 1992) ..... *passim*
Municipal Utils. Bd. of Albertville v. Alabama Power Co., No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Jan. 9, 1990) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

New England Motor Rate Bureau v. FTC, 908 F.2d 1064 (1st Cir. 1990) 13, 14
Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) 18
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 27
Parker v. Brown, 317 U.S. 341 (1943) ..... *passim*
Patrick v. Burget, 486 U.S. 94 (1988) ..... *passim*
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 19, 20
Ticor Title Ins. Co. v. FTC, 922 F.2d 1122 (3rd Cir.) *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *rev'd*, 112 S. Ct. 2169 (1992) ..... *passim*
United Mine Workers v. Pennington, 381 U.S. 657 (1965) 12, 16
United States v. Borden Co., 308 U.S. 188 (1939) .. 18
United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 18, 20
Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260 (3rd Cir. 1994) 25

AGENCY DECISIONS AND OPINIONS

Association of Businesses Advocating Tariff Equity ("ABATE") v. Detroit Edison Co., Case NU-10143, *et al.* —— MPSC —— (April 11, 1994) 28
Consumers Power Co. (Midland Units 1 and 2), 6 N.R.C. 892 (Appeal Board, 1977) 27
Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation, Case R. 94-04-031, I. 94-04-32, —— CPUC —— (April 20, 1994) 28

STATUTES AND REGULATIONS

15 U.S.C. § 1 (Supp. II 1990) 2
15 U.S.C. § 2 (Supp. II 1990) 2
15 U.S.C. § 26 (1988) 2

TABLE OF AUTHORITIES—Continued

	Page
Federal Power Act, as amended by Public Utility Regulatory Policies Act	
16 U.S.C. § 796(17)-(22) (Supp. 1994)	9
16 U.S.C. § 824c-3 (Supp. 1994)	9
28 U.S.C. § 1254(1)(a) (1988)	2
18 C.F.R. §§ 292.101 to -.602	9
Ala. Const. of 1901, art. IV, § 48	14
Ala. Const. of 1901, art. IV, § 63	9
Ala. Code §§ 37-12-3 (1992)	9
Ala. Code §§ 37-14-1 to -17 (1992)	*passim*
Ala. Code §§ 37-14-30 to -40 (1992)	*passim*
Ala. Code § 37-14-36 (1992)	6
MISCELLANEOUS	
1984 Ala. House J. 32, 127, 1404-05	9
1985 Ala. House J. 25-26, 89, 273, 282-83, 288; 293-96, 300, 2181-82, 2205-06, 2339	9
1984 Ala. Senate J. 207, 322, 405, 594, 703, 1144	9
1985 Ala. Senate J. 29-30, 146, 232, 545, 684, 706	9
Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 215(c) (1978) (Supp. 1993)	26
Gilbert and Sullivan, *Iolanthe*	25
John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986)	26, 29

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The May 23, 1994 opinion of the court of appeals (Appendix A, 1a-8a) is reported at 21 F.3d 384. The March 4, 1992 decision of the court of original jurisdiction, the United States District Court for the Middle District of Alabama (Appendix B, 9a-26a), is unreported. The July 5, 1991 opinion of the court of appeals (Ap-

pendix D, 29a-51a) is reported at 934 F.2d 1493. The January 9, 1990 decision of the United States District Court for the Middle District of Alabama (Appendix E, 52a-70a) is unreported.

JURISDICTION

The court of appeals rendered its decisions on May 23, 1994 and on July 5, 1991. Rehearing on the May 23, 1994 judgment was denied on August 26, 1994. (Appendix C, 27a-28a). This court has jurisdiction under 28 U.S.C. § 1254(1)(a) (1988).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990), and the Clayton Act, 15 U.S.C. § 26 (1988), are reproduced as Appendix F (71a) and Appendix G (72a), respectively. Ala. Code §§ 37-14-1 to -17 (1992) is reproduced as Appendix H. (73a-96a). Ala. Code §§ 37-14-30 to -40 (1992) is reproduced as Appendix I. (97a-125a).

STATEMENT OF THE CASE

1. *Factual Background*: This case involves challenges under the Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990), and the Clayton Act, 15 U.S.C. § 26 (1988), to two acts passed by the Legislature of Alabama (hereinafter "the Legislature") prescribing procedures for the establishment of exclusive retail electric service areas. The legislation establishes general rules for dividing electric territories. The legislation also incorporates sixteen private agreements that were previously entered into by various electric suppliers and governs the division and allocation of exclusive retail electric service areas.

Petitioners include 30 Alabama municipalities, public corporations or boards which own and operate electric distribution facilities and the City of Lincoln which would like to enter the electric distribution business (hereinafter

collectively referred to as "the Cities"). Each of these municipal electric systems competes, or potentially competes, with Alabama Power Company ("APC"), Alabama's largest wholesale and retail electric company, or with rural electric cooperatives.

The Cities brought suit against APC, twenty-two rural electric cooperatives and the electric cooperatives' statewide association, the Alabama Rural Electric Association of Cooperatives, (all collectively referred to as "APC/Coops") seeking declaratory and injunctive relief and damages for violations of the Sherman and Clayton Acts.

The Cities alleged that APC/Coops had entered into an agreement to divide, horizontally, retail electric service territories in Alabama between themselves, constituting a *per se* violation of the federal antitrust laws. The Cities further alleged that APC/Coops acted jointly to enforce their illegal territorial agreement against the Cities by securing ratification of the sixteen private agreements submitted to the Alabama Legislature that were ultimately passed as part of the 1984 Service Territories for Electric Suppliers Act (hereinafter "the 1984 Act") and the 1985 Service Territories for Electric Suppliers Act (hereinafter "the 1985 Act") (collectively referred to as "the Territorial Acts") during the 1984 and 1985 regular legislative sessions.[1] The separate private agree-

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[1] Prior to 1984, Alabama had no legislation authorizing the assignment of exclusive retail electric service areas. In 1984, the Legislature enacted the Service Territories for Electric Suppliers Act for the stated purpose of limiting wasteful electric line duplication. (73a-96a). The 1984 Act prescribed procedures for the establishment of exclusive service territories for Alabama's retail electric suppliers. This legislation was subsequently held invalid by the United States District Court for the Middle District of Alabama and enjoined from enforcement. *Dixie Elec. Coop. v. Citizens of the State of Alabama*, Civil Action No. CV 84-V-891-N (M.D. Ala. Nov. 2, 1984). The Eleventh Circuit subsequently found, however, that the case had been wrongfully removed from the state court to federal court, and vacated the district court's

ments were exceptions to the general provisions of the Territorial Acts; these agreements were incorporated by reference and made part of the Territorial Acts.[2]

The Cities also alleged—notwithstanding the preambles to the Acts that approve the private agreements and state that the purpose of the legislation is to avoid adverse impacts from the "duplication of electric distribution facilities used for the furnishing of retail electric service"—that the purpose of the Territorial Acts and the private agreements incorporated into the Acts is to eliminate competition. Ala. Code § 37-14-1 and -30. (73a-74a, 97a-98a).[3]

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judgment. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir. 1986).

While the decision holding the 1984 Act invalid was on appeal in 1985, the Legislature enacted a second Service Territories for Electric Suppliers Act in an effort to address the infirmities that had been identified by the federal district court. (97a-125a). The 1985 Act stated that if the courts determined that the 1984 Act was constitutional, with a few specified exceptions, those provisions of the 1985 Act that were inconsistent with the 1984 Act would no longer be effective. (124a-125a).

[2] The 1984 Act incorporated by reference twelve private agreements which it referred to as "Exemptions." The 1985 Act listed a total of fifteen agreements, eleven of which were originally listed in the 1984 Act and four of which were additions. The private agreements incorporated by the Legislature into the Territorial Acts differ substantially from the general provisions of the Territorial Acts. While some of the private agreements were executed relatively contemporaneously with the enactment of the general provisions of the Territorial Acts, other private agreements had been entered into many years before the passage of the Acts.

[3] Although the Territorial Acts themselves do not bar duplicative electric lines, the Acts do prevent competition. For example, the Territorial Acts tacitly allow line duplication by permitting sales by APC/Coops to certain large and desirable electric customers located within the Cities. The Cities cannot, however, similarly compete for large customers outside their territories. The Territorial Acts also allow for the elimination of competition in other ways that do not prevent line duplication. *See* Affidavit of Dr. John W. Wilson (Appendix M, 145a-157a). For example, the Cities are prohibited from granting a franchise to a new utility that is

The Territorial Acts permit each city's primary electric supplier to purchase the electric distribution facilities of other suppliers within the municipality as of the date of enactment of the Act. (79a-84a, 105a-112a). Outside city limits, electric suppliers cannot serve premises already served by another supplier. For a new customer, the electric utility whose lines are closer to the prospective customer must serve that customer. However, APC/Coops may compete in other suppliers' assigned service areas to serve new large industrial customers whose "loads" exceed 2500 kilowatts. (77a-78a, 102a-103a). These customers are particularly valuable. The Territorial Acts prohibit a city from serving any customer outside its service boundaries, even if the city annexes new territory. In addition, the Acts effectively prevent the formation of new electric systems by, among other means, preventing municipalities from forming new municipal systems or franchising utilities other than existing suppliers. (153a-155a).

In addition, the private agreements that the Legislature incorporated by reference into the Territorial Acts also eliminate competition. The private agreements divide

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attempting to displace an existing electric supplier. Under the Acts, no matter how inferior service or price may be, a utility has a right to continue to serve in an area. As is set forth in the Affidavit of Dr. John W. Wilson, a well-known economist and expert on the electric power industry who served as Chief of the Federal Power Commission's Division of Economic Studies, stated in the record that such competition to win a franchise has nothing whatsoever to do with preventing wasteful facilities duplication and, therefore, unnecessarily and improperly removes a powerful tool for inducing efficient performance by the franchise owner.

Dr. Wilson testified as to the important competition which exists in the electric utility industry and the harmful effects on the Cities and the public at large from its elimination. To the extent that head-to-head competition to prevent line duplication is eliminated, Dr. Wilson testified to the lower courts that, "it therefore makes it even more imperative to protect and nurture the kinds of competition (especially franchise competition) that remain, so as to avoid the likely evolution of exorbitant costs and rates due to a complete insulation of suppliers from market incentives." (156a).

territories. The agreements also (i) substantially alter the service area assignments that would have existed in the affected areas under the general provisions of the Territorial Acts and (ii) in some instances authorize future revisions to service area boundaries or reassignments of customers by the electric suppliers who are parties to the private agreements.[4]

Agreements effecting substantial departures. Two of the incorporated private agreements illustrate the substantial departures from the service area assignments that would have been effected under the general provisions of the Territorial Acts. (Appendix K, 139a-141a; Appendix L, 142a-144a). The Covington/Elba Agreement provided that Covington could retain certain electric distribution facilities located within Elba City limits and could serve new premises that were located within two hundred fifty feet of Covington's retained distribution lines. Elba was allowed to serve a 47 acre tract outside of the city limits, in essence, as "compensation" for agreeing not to purchase certain of Covington's electrical distribution facilities within the City. (139a-141a). Similarly, under the APC/Southern Pine Agreement, the parties agreed that Southern Pine would retain certain areas within the Cities of Brewton and Flomaton, Alabama, that would otherwise have gone to APC under the Territorial Acts and that APC would serve certain areas outside these Cities that were closer to Southern Pine's electrical lines. (142a).

Agreements authorizing future revisions. Three private agreements expressly authorize the parties themselves to make future revisions to their territorial allocations with-

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[4] **The district court construed the language in the 1985 Act that "no subsequent agreement shall be valid unless and until it has been reviewed by the legislature and the legislature has amended this section to mandate the implementation of the provisions of such agreement," Ala. Code § 37-14-36 (113a-116a), as meaning that even those customer or territorial allocations contemplated under the individual private agreements, and presumably any discretionary decisions implementing the agreements, would require additional legislative approval. (21a).**

out additional authorization from the Alabama Legislature. (Appendix J, 126a-137a). Under the terms of the Tarrant City/APC Agreement, the City of Tarrant City would distribute electricity to all residential customers within its corporate limits as of June 8, 1983 (as indicated on a map attached to the agreement) (137a), and, subject to certain exceptions, to all non-residential customers within these areas. The Agreement further provides for annexations and makes exceptions within certain specified areas based upon the size of customer load, including giving an election to certain customers to purchase electricity from APC. In addition, if the parties agree, upon the request of the customer APC may serve new customers having loads of less than 5,000 kw in the City's service area. (133a-134a).

The Southern Pine/Evergreen Agreement pertains to an area that, at the time of the Agreement's adoption, was soon to be annexed into the City of Evergreen. The Agreement provides that Southern Pine would continue to serve its existing customers within the annexed area, "as well as all new customers located along . . . [then] existing lines within three hundred feet (300′) from the edge of the right-of-way of street or road, or the lots, or city blocks existing along the lines . . . [then] used by Southern Pine . . ., provided, however, that any new industry who might locate in these areas shall be negotiated as to who will serve the industry . . . [sic]" by the City and Cooperative. (150a).

Likewise, the Cullman Utilities Board/Cullman Electric Cooperative Agreement establishes a boundary separating the service areas of the electric suppliers to the Agreement. The Agreement provides that if either party refuses to make service available to a prospective customer in the party's assigned service area, the other party may, after submission to it by the prospective customer of proof of the other supplier's refusal to serve, commence the service to the customer upon certain notice requirements. Further, where one party extends lines into another's service area, "the service area boundary established by this agree-

ment shall be considered *automatically* revised . . . ." (151a) (emphasis supplied).

In addition to the Cities' contentions that the express provisions under the private agreements allow the parties to those agreements to reallocate customers, the Cities contended that practical circumstances would make the exercise of private discretion in allocating customers inevitable. For example, maps under old agreements have reference points that have become dated or that no longer exist.

The Cities alleged that there is no state supervision provided in implementing the territorial divisions negotiated by the parties to the private agreements. Of course, there could be no current legislative involvement in the formation of the private agreements that were entered into before the enactment of the general provisions of the Territorial Acts, one of which dates back to 1940. The Territorial Acts show on their faces that the Acts merely declared legal the earlier private agreements, as those agreements had been drafted.

Moreover, the Cities alleged that there was no evidence that the Legislature had all of the private agreements when the Territorial Acts were passed, thereby making it impossible for the Legislature to scrutinize the private agreements for consistency with the Territorial Acts.[5] In addition, although the private agreements were listed by name and date in the legislation, these agreements were never

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[5] Copies of the private agreements that were incorporated by reference in the bills that were enacted as the 1984 and 1985 Acts, respectively, at the times those bills were introduced in the Legislature, were delivered to the offices of the Clerk of the House of Representatives and the Secretary of the Senate of Alabama, respectively; however, other private agreements were added to each of these bills by amendment, and there is no evidence that copies of those agreements added by amendment were similarly delivered. There also is no evidence that the members of both houses of the Legislature were informed that copies of the private agreements were available for review.

recorded as having been read in a legislative session,[6] nor were they assigned to and reviewed by any legislative committee, nor were the merits of the provisions of the private agreements ever debated, nor do the texts of any of the private agreements appear in any legislative journals or official records. *See* 1984 Ala. House J. 32, 127, 1404-05; 1984 Ala. Senate J. 207, 322, 405, 594, 703, 1144; 1985 Ala. House J. 25-26, 89, 273, 282-83, 288, 293-96, 300, 2181-82, 2205-06, 2339; 1985 Ala. Senate J. 29-30, 146, 232, 545, 684, 706.

The private agreements also are not readily available to the customers of the parties to the agreements. The agreements do not appear in the legislative acts or in the codifications of those acts nor are the agreements on file in the Legislature or the Alabama Public Service Commission.[7] Further, the agreements have not been reviewed or approved by the Alabama Public Service Commission. In fact, obtaining the agreements from the parties themselves is the only source of access to the agreements available to customers of the parties of which the Cities are

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[6] Ala. Const. of 1901, art. IV, § 63, provides in pertinent part that "Every bill shall be read on three different days in each house, and no bill shall become a law, unless on its final passage it be read at length . . . ." The texts of the private agreement were not in the bills that ultimately were enacted as the Territorial Acts and were not, therefore, ever read to either house of the Legislature.

[7] In this respect, the Territorial Acts differ materially from rules and regulations adopted by the Legislature pertaining to electric cogeneration facilities and cogenerators, *i.e.*, applicable provisions of the regulations which had been promulgated as of July 6, 1983, by the Federal Energy Commission under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 796(17)-(22) and 16 U.S.C. § 824 a-3 (Supp. 1994); such regulations being embodied in 18 C.F.R. §§ 292.101 to -.602. Ala. Code § 37-12-3 (1992). In that instance, the Legislature said:

> A copy of said regulations, as compiled and published in 18 Code of Federal Regulations Part 292 as of July 6, 1983 and incorporated in a volume entitled "Regulations Relating to Cogeneration Facilities Adopted for the State of Alabama," shall be maintained by the secretary of the Alabama Public Service Commission.

aware. Because of the failure of the Legislature to review the private agreements, the Cities contended that the statement in the 1984 Act and the 1985 Act that the agreements "have been reviewed by the legislature" is an empty recitation, and nothing more. (86a-88a, 113a-115a). The Cities' contentions were supported by the deposition testimony of Senator Eugene "Crum" Foshee, the Senate chief sponsor and floor leader for the Territorial Acts in the *Dixie Elec. Coop. v. Citizens of Ala.*, CV-84-575-PR (Circuit Court of Montgomery County, Alabama) case as follows:

Q. As the sponsor of the legislation, how did you determine what contracts would be included in Section 7?

A. Those contracts that were agreed on and put in the bill. I didn't draw up the bill, you understand that.

* * * *

Q. Well, is it your testimony that someone other than you decided which agreements would go into the bill?

A. Yes.

Q. And when you say someone other than you, do you mean someone outside of the Legislature?

A. Yes.

* * * *

Q. Were you satisfied with your ability then to determine whether or not they were consistent with the purposes of the Act after you—

A. I would say I am not able to determine, but I accepted the fact that several different parties apparently agreed to something, nobody came forward and argued against them so I assumed they were legitimate agreements.

Q. Okay. And when you say that several different parties had agreed to them, are you talking about the actual parties to the contracts themselves?

A. Yes.

Q. Okay. And because they had agreed to them, you considered that they were sufficient to be included within Section 7 of the Act?

A. I would think so, yes.

The Cities further contended not only that the sixteen private agreements were the product of unsupervised private action, but there is no provision in the Territorial Acts for state supervision of the implementation of the overall agreements. The general provisions of the Territorial Acts provide that within nine months of the effective date of the Territorial Acts maps were to be exchanged by electric suppliers showing their distribution facilities as of January 1, 1984. (78a, 103a-104a). However, there was no repository established where interested parties could find the maps, no state supervision of the drawing or implementation of these maps and no exchange of a substantial number of the maps. There is no provision, as there is in other states, for Alabama's Public Service Commission (or other state agency) to review the implementation of the territorial agreements, enforcement of the agreements, modification of the agreements, or resolution of disputes arising under the agreements.[8]

2. *Proceedings Below*: In the District Court for the Middle District of Alabama and on appeal to the Eleventh Circuit Court of Appeals, the Cities challenged the APC/Coops' agreements to divide territories for retail electric service as *per se* violations of the federal antitrust laws. APC/Coops claimed that their conduct was protected

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[8] The Cities alleged that the "reverse" severability clauses contained in the Territorial Acts, (95a-96a, 124a), under which if any part of the Territorial Acts were subsequently held to be invalid, the Acts would be rendered wholly invalid, provide further evidence that rather than representing any broad public policy, the Territorial Acts were intended only to ratify private agreements. Under this clause, if any one of the separate private agreements is disallowed, the Territorial Acts fail in their entireties. The Cities contended that this unusual provision was to ensure that each of the parties got the benefit of its bargain.

under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), which excludes from antitrust coverage state action to displace competition with regulation or monopoly service. APC/Coops also relied on the *Noerr-Pennington* doctrine, which protects certain acts of petitioning the government to secure favorable action. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The Cities contended (i) that their action was not barred either by the state action or the *Noerr-Pennington* doctrines and (ii) that although the state may supplant competition with regulation, under *Parker* and its progeny, a state may not merely declare private anticompetitive conduct to be lawful or to "rubber-stamp" private antitrust violations; any private antitrust violations that are "authorized" must be the product of and actively supervised by the state. *Patrick v. Burget*, 486 U.S. 94 (1988); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).[9] The Cities argued that *Noerr-Pennington* was inapplicable, because the Cities were not challenging APC/Coops' acts of lobbying but were challenging their acts of entering into and enforcing private territorial agreements as prohibited by *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and later by *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

On appeal from the district court's first judgment in this case, the court of appeals held:

> A state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining com-

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[9] APC/Coops, relying on *Hoover v. Ronwin*, 466 U.S. 558, argued that if otherwise applied, these cases could be distinguished on the grounds that here the state legislature, and not a subordinate agency, had acted.

petition; and (2) the policy was actively supervised by the state. *Midcal,* 445 U.S. at 105.

42a.

The court of appeals determined that the state "has control over all of the decisions being challenged by the Cities in this litigation, *e.g.*, to divide service territories inside and outside municipal limits and to limit competition for large industrial customers of electricity." (45a). The court nonetheless held that it could not "determine whether the private agreements [that were incorporated by reference] qualify for state action immunity . . . because the terms of the private agreements are not in the record of this case or in the Alabama Code, . . ." (48a).

On remand, in granting summary judgment for APC/Coops as it had previously, the district court cited the Eleventh Circuit's conclusion "that the Alabama Legislature has exercised sufficient control over the Acts' service territory allocations to satisfy the active supervision test applicable to private parties under *Midcal.*" (13a). The district court also cited the provisions of the Territorial Acts requiring that new private agreements receive legislative approval and the trial court determined that this provision should be read to include discretionary allocations that are allowed under certain of the approved private contracts. (19a). Citing the First Circuit "that a federal court 'should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma. . . .[,]' " (*New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1076 n.18 (1st Cir. 1990)) and the Third Circuit that "[a]vailability of the state action doctrine does not depend upon the quality of state supervision[,]" (*Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1140 (3rd Cir.), *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *rev'd*, 112 S. Ct. 2169 (1992)), the district court held on remand that the incorporated agreements qualified for state action immunity. (19a-21a).

The Cities appealed, relying on this Court's subsequent decision in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169

(1992), reversing the Third Circuit and displacing the First Circuit's *New England Motor Rate Bureau* formulation. The Cities also argued that placing copies of the agreements in the hands of the Clerk of the House and Secretary of the Senate of Alabama, respectively, *at nearly the same time* as the agreements were incorporated into the Territorial Acts afforded—at best—the mere potential for legislative supervision; the Cities argued that such mere potential for supervision was insufficient to constitute state action affording *Parker* immunity. The Cities also challenged the district court's construction of the provision requiring that new private agreements receive legislative approval as applicable to discretionary territorial revisions under the agreements as contrary to both the language of the Acts and of the agreements, which provide expressly for service area modifications.

On appeal, the Eleventh Circuit recognized that the private agreements "authorize the parties to them, by mutual consent, to assign new customers between themselves," and that their provisions would "appear to give the parties the right to allocate new customers without the Legislature's approval." (4a-5a). However, the court affirmed on the ground that the district court had acted reasonably in interpreting the Territorial Acts, thereby sustaining their validity and furthering "the obvious intent of the Alabama Legislature to confer state action immunity to the parties of the incorporated agreements." (7a).[10] The cities sought rehearing on the grounds that

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[10] The Cities argued that the interpretation of the Territorial Acts requiring new legislation to authorize every switch in customers was a contrivance designed to save the Acts but was contrary to the clear meaning of both the Acts and to common sense. For example, under the court's interpretation, parties could go for months without electricity while the Legislature was out of session, assuming that the legislature was prepared to act on individual electric customer allocation questions. By law, the Alabama Legislature meets only 30 legislative days a year during a 105 day session, beginning either in February or April. Ala. Const. of 1901, art. IV, § 48, *amended by* Ala. Const. of 1901 amend. 39, 57, and 339. If a need for amendment arose during the summer, after the legislative

Midcal mandated that the Legislature actively supervise the private agreements (or provide a mechanism for their active supervision) that were incorporated into the Acts. Rehearing was denied.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

This case merits review because i) the decisions below directly conflict with a series of opinions of this Court, including the recent decision in *F.T.C. v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), ii) the district court relied upon one decision that has since been reversed and one decision that has since been displaced, and iii) the legislation at issue in this case so clearly does not satisfy the requirements of *Ticor* and *Midcal* that, if left to stand, the decisions below could provide a pathway for private parties to obtain legislative antitrust exemptions.

For example, under the lower courts' decisions, it would be permissible for automobile companies, computer manufacturers, or other competitors to establish market divisions throughout Alabama for the sale of automobiles, computers or any other products, if they could get the state legislature to ratify their deals. For the same reason that such territorial agreements would not be allowed in the automobile market, such agreements should not be allowed in the electric industry. *See FTC v. Superior Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (holding that anticompetitive private agreements do not become protected under the *Noerr-Pennington* doctrine merely be-

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session ended, the parties might be unable to amend their agreement until the following spring. The Cities pointed out that there was no vehicle for notice in either the Acts or the contracts so that the Legislature or interested parties could become aware of territorial or customer transfers. The court recognized the problem but nevertheless affirmed the district court's construction of the statute that the Legislature (itself) intended to review all future modifications (*i.e.*, implementations) of the contracts. (7a-8a).

cause parties seek legislative approval after entering into the agreements).[11] Thus, the lower court decisions distort the core of the *Parker* doctrine: states may displace competition with regulation, but states may not use the doctrine to authorize private violations of the Sherman Act. *Parker*, 192 U.S. at 351-352.

Likewise, permitting the market divisions at issue here would be directly contrary to the *Midcal* requirements that private anticompetitive activity allowed under the state action doctrine must be both actively supervised and undertaken pursuant to a clearly articulated state policy. *Midcal*, 445 U.S. 97. When there is no state policy supplanting competition with regulation or monopoly service, state public service commission ("PSC") approval does not remedy Sherman Act violations. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (no state policy existed; only a permissiveness that allowed the company to act anticompetitively or not as it chose). Here, not even the potential for PSC or state agency review of private utilities' anticompetitive activity is provided. *See Ticor*, 112 S. Ct. 2169 (finding illegality because of inadequate regulatory review).

Petitioners request a grant of *certiorari* and summary reversal because the decisions in this case conflict directly with this Court's decision in *Ticor*, and a host of other cases, which mandate that *if* the states are to be allowed, in effect, to override the Nation's antitrust laws, the private anticompetitive conduct insulated by the state must be actively supervised. The insistence on *active* supervision is to ensure that the private conduct does, in fact, implement policies established by the state and does not constitute conduct undertaken for private purposes over which the state has merely cast a protective or "gauzy" cloak of state involvement. *Midcal*, 445 U.S. at 105-106; *Ticor*; *Patrick v. Burget*, 486 U.S. 94.

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[11] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

If this Court does not act summarily, the case warrants review because the decisions below allow states to override federal antitrust law by ratifying private agreements to divide territories, or any other agreements contrary to the antitrust laws, provided that they act by legislative, as opposed to administrative, action. *Parker* and the state action doctrine permit states to substitute regulatory schemes for competition. However, if the doctrine can be read as a license for states to approve anticompetitive private agreements, then the states will have a license to override the antitrust laws at the behest of local industry or special interest groups. Indeed, the decisions of the courts below suggest that had the parties in *Ticor* merely gone to the Legislature and gotten a state law authorizing their conduct, even if the law provided for no supervision, their conduct would be legal. (7a-8a, n.4).

Alert that under the *Parker* doctrine the states are effectively providing antitrust exemptions, this Court, in *Ticor*, held that in providing immunity, the states must give real and not facial supervision to protected conduct. Petitioner Cities respectfully submit that if the Court believes that there may be grounds to limit *Ticor* so that it should not apply to legislative action with the same rigor as to administrative action, then it is important that the Court review this question. Otherwise, states will be given full license to override the antitrust laws by passing private benefit legislation.

Finally, the Cities suggest that if the Court is inclined to believe that the *Parker-Midcal-Ticor* tests have been met (although it is clear that they have not), it may be time to revisit the state action doctrine. An examination of the cases and comments about them suggest that a better analysis than the traditional formulations would be to accept or reject state action based upon whether that action promotes a clear state regulatory or other governmental policy or simply promotes private interests.

I. THE DECISIONS BELOW ARE CLEARLY CONTRARY TO THE SHERMAN ACT AND THE RECENT DECISIONS OF THIS COURT; THEREFORE, A GRANT OF *CERTIORARI* AND SUMMARY DISPOSITION IS WARRANTED AND REQUESTED

By granting motions to dismiss, which were treated as summary judgment dispositions without any factual hearing, the lower courts have sanctioned a private overall territorial agreement and, in addition, sixteen separate private territorial agreements that are *per se* illegal under the antitrust laws. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972). *See also Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.) *cert. denied*, 439 U.S. 966 (1978).

The Sherman Act has long been recognized as providing "a comprehensive charter of economic liberty." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). These principles were recognized most recently in *Ticor*, 112 S. Ct. at 2176. While there are occasional exceptions from its rules providing for competition, these exceptions are to be construed narrowly. *See United States v. Borden Co.*, 308 U.S. 188 (1939).

In *Parker v. Brown*, 317 U.S. 341, this Court announced the state action doctrine, which protects certain state legislative and other actions against antitrust attack when those actions are taken pursuant to a valid state policy to supplant competition with regulation. However, the *Parker* exclusion is limited. *Parker* did not sanction illegal action merely because an arm of the state is involved:

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197 [1904] . . .

Id. at 351-52. *See also Ticor*, 112 S. Ct. at 2176-77; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1353-54 (1991); *Midcal*, 445 U.S. at 104, 106; *City of Lafayette, La. v. Louisiana Power & Light*

Co., 435 U.S. 389, 416 (1978), *overruled in part on other grounds Hallie v. Eau Claire*, 471 U.S. 34 (1985); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

In *Midcal*, this Court imposed a two-part test under which challenged antitrust conduct that is purportedly protected by the state action doctrine must be taken pursuant to a "clearly articulated" state policy and must be "actively supervised." These requirements were to ensure that challenged actions in fact represented state action and not private action "masquerading" as action of the state. The Court further explained the rationale behind its requirement of *active* state supervision of would-be anticompetitive private conduct in *Patrick v. Burget*, 486 U.S. at 100-01:

> The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985); see *id.*, at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46-47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . [citation omitted]; *Parker v. Brown, supra*, at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board). . . . Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Most recently, in *Ticor*, this Court reiterated that for private conduct to be protected under the state action doctrine "actual state involvement, not deference" to private arrangements is the "precondition." 112 S. Ct. at 2176-77. "Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Id.* at 2177.

Against this background, it is apparent that the decisions below are directly contrary to the Sherman Act, to *Ticor*, and to multiple other decisions of this Court. *Patrick*, 486 U.S. 94; *City of Lafayette*, 435 U.S. 389; *Midcal*, 445 U.S. 97 (1980); *Cantor*, 428 U.S. 579; *Topco*, 405 U.S. 596 (1972); *Schwegmann Bros.*, 341 U.S. 384 (1951).

The courts below sanctioned private action that is plainly illegal under the antitrust laws. The private territorial agreements were merely ratified or rubber-stamped by the Alabama Legislature. No review of the agreements occurred. This suggestion of review was merely a recitation in the legislation. *Parker v. Brown* permits state action, including state regulatory actions that implement policies of the state; it does not permit, however, the states, in the words of *Parker*, to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.[12]

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[12] This Court has similarly ruled that the *Noerr-Pennington* doctrine cannot be used to allow parties to protect private agreements from antitrust scrutiny by entering into them and then seeking legislative ratification, as was the case here. As this Court said in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990), *quoting Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. at 503 (1988):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. *But see Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the

The Eleventh Circuit, in its July 5, 1991 opinion, viewed the *Midcal* test as the means of ensuring that states do not merely ratify anticompetitive private action. (48a). However, the courts below were satisfied with an articulated state policy that was merely an acceptance of agreements that had been previously entered into by the parties. In fact, different agreements would have been equally acceptable. As is apparent from the face of the Territorial Acts, the territorial divisions were approved by the Legislature because they had been agreed to privately.

The courts below also allowed implementation of private territorial allocations where there was *no* state supervision of private discretion on the theory that the state could later ratify proposed territorial changes. This theory was adopted in spite of allegations that territorial maps as required under the Territorial Acts (that sanctioned the private agreements and shielded the agreements from antitrust attack) were not reviewed by the Legislature, were not available for public view and, indeed, in many instances were never exchanged. Simply stated, the potential for any state corrective action or oversight of the agreements was theoretical at best. As neither the overall nor the individual agreements were supervised when they were entered into or will be supervised in their implementation, the decisions below are directly contrary to this Court's decision in *Ticor*.

The Cities are aware that this Court does not sit as a court of general review. However, the decisions below are so contrary to recent precedent of this Court and involve such a significant area of law that summary reversal is warranted. Reversal is warranted because of the Eleventh Circuit's affirmance of the district courts' decision that cited and relied upon the Third Circuit's decision in *Ticor* —a decision subsequently overturned by this Court. 112

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government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. *But see Georgia v. Evans*, 316 U.S. 159 (1942).

S. Ct. 2180. Although this Court had overturned the Third Circuit's *Ticor* decision in June of 1992 (nearly two years before the Eleventh Circuit's May 23, 1994 decision in this case) the Eleventh Circuit neither discusses nor even cites this Court's *Ticor* opinion. This is in spite of the fact that the Cities had claimed that this Court's decision is controlling and in spite of the district court's reliance on the vacated Third Circuit decision. Had this Court's decision in *Ticor* been decided before the district court's May 4, 1992, decision, which was affirmed by the Eleventh Circuit by relying on the trial court's discretionary reading of the Territorial Acts, it is unlikely that the district court would have found the private agreements immune from antitrust attack. If the lower courts' decisions are allowed to stand, other courts will be encouraged to interpret the *Midcal* test as allowing for exception. In addition to leading to unnecessary litigation to determine the location of an undiscernible line between enough and not enough supervision, basic antitrust policy as established by this Court will be undermined.

II. IF THE ELEVENTH CIRCUIT IS NOT SUMMARILY REVERSED, THE COURT SHOULD REVIEW WHETHER STATES MAY PROVIDE PRIVATE PARTIES WITH ANTITRUST PROTECTION BY PASSING LEGISLATION THAT DOES NOT CONFORM TO THE *PARKER, MIDCAL* AND *TICOR* TESTS; ALTERNATIVELY, THE COURT SHOULD RE-EXAMINE THE SCOPE OF THE *PARKER* STATE ACTION DOCTRINE

This case involves an issue that may never have been presented to the Court in quite the same way–whether the mere potential for legislative scrutiny or review of private, otherwise *per se* anticompetitive, conduct constitutes state action sufficient to confer *Parker* immunity. In other words, if the mere potential for scrutiny of private conduct by an administrative agency is insufficient to confer state action immunity, *see Ticor*, is the mere potential for scrutiny by the state's legislature sufficient to con-

fer state action immunity where the legislature, rather than a subordinate agency, acts?

The district court, saying "The [c]ourt finds that the incorporated territorial agreements were available for study and review by the members of the Alabama Legislature and the public at or prior to the passage of the Acts," in effect, held that the mere potential for legislative scrutiny of the private agreements had been sufficient to confer state action immunity upon them. (14a). The Cities pointed out to the district court, as well as to the Eleventh Circuit, that the placement of copies of certain of the private agreements in the offices of the Clerk of the House and the Secretary of the Senate of Alabama, respectively, constituted the gauziest cloak of state involvement, particularly when (1) there was no official record or evidence that even all of the agreements had been delivered to the Clerk and the Secretary; (2) there was no official record or evidence that both houses of the Legislature had been informed that copies of the agreements were available for review; (3) informal readings by individual legislators (even if it could be shown that these occurred) does not equate to "review" by the Legislature; and (4) the Legislature tacitly admitted the paucity of its scrutiny or involvement in its finding expressed in the legislation that the private agreements had been "found not to be inconsistent with the purposes and policies set forth in . . . [the Acts]." (86a-88a, 113a-116a). Nonetheless, both lower courts were willing to rely upon the fact that certain of the private agreements were available for review by members of the Alabama Legislature as sufficient to confer antitrust immunity.[13]

In *Ticor*, this Court dispelled the mistaken notion that had been embraced by a number of lower courts that the

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[13] The Cities stressed that they were not asking the court to assess the wisdom of the Legislature's action but to determine objectively whether the Legislature had reviewed the agreements at all. The Cities argued that to exempt the agreements from the antitrust laws there must be some review of the challenged agreements.

mere potential for regulatory review was sufficient to confer state action immunity. In this case, guidance from the Court is urgently needed to dispel the equally mistaken notion that the mere potential for review of private anticompetitive conduct by individual legislators was sufficient to confer state action immunity. Further, guidance is needed to confirm that the established "articulated policy" and "state supervision" requirements are still in full force.

There is a suggestion in the decisions below that the lower courts recognize, as they must, the conflict between their decisions and the *Midcal-Ticor* requirements. However, because the approvals of the APCo/Coops' territorial agreements and the actions taken under them were accomplished by legislation, the lower courts may have felt that these private anticompetitive actions were entitled to protection. Thus, for example, in note 4 of the Eleventh Circuit's 1994 decision, the court rejected out-of-hand that it must determine "whether the Legislature, in incorporating the agreements into the Acts by reference, exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of deliberate state intervention." (7a-8a, n.4). The court cited *Hoover v. Ronwin*, 466 U.S. at 567-68, as "holding that, under the *Parker* doctrine, a state legislature's actions are *ipso facto* exempt from the operations of the antitrust laws, because its actions constitute those of the state." (7a-8a, n.4). Likewise, the district court, which was affirmed by the Eleventh Circuit, stated its disinclination to question whether the Legislature had, in fact, reviewed the agreements. ("[T]his Court looks to the terms of the agreements and not to the process by which they were incorporated into the Acts.") (15a-16a). Further, although the statutes approved the private market divisions, which on their faces provided for unsupervised private

discretion, the court felt itself duty-bound to interpret the Territorial Acts as though such discretion did not exist.[14]

Apart from the issue of whether the Legislature in fact reviewed the agreements, the courts below (i) permitted the Legislature to ratify private anticompetitive conduct, contrary to *Parker* and (ii) failed to apply the *Midcal* tests, contrary to *Ticor*. If, however, under *Hoover v. Ronwin*, or otherwise, this Court deems that the prohibitions against states rubber-stamping private antitrust violations may be inoperative where there is legislative action or that the Legislature may ignore *Midcal*, then important issues of statutory interpretation and of national policy are raised that mandate this Court's review. Such exclusion of legislation from the *Ticor* and *Midcal* standards would permit states, at the behest of private parties, to circumvent the national policy in favor of antitrust enforcement. Because such private legislation can often aid local industry at the expense of companies elsewhere and at the expense of commerce, such exemption from the antitrust laws should not be readily presumed.

Further, denial of *certiorari* will leave standing the lower courts' decisions that failed to consider *Ticor*, and therefore, conflict with the decisions in other circuits that have recognized the need to apply *Ticor*. *See, e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3rd Cir. 1994) (evaluating state commission's articulated policies and supervision against the requirements of *Ticor*) and *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), *cert. denied sub nom. United States Metroline Servs. v. Southwestern Bell Tel. Co.*, 114 S. Ct. 183 (1993) (applying *Ticor*, as required by this Court, and determining that

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[14] **The courts' creative interpretation of the Territorial Acts as mandating legislative review of future private discretion is reminiscent of the Lord High Chancellor's statutory construction in Gilbert and Sullivan's *Iolanthe*. In *Iolanthe*, a clear misconstruction of the law causes love to triumph and nobody to be hurt. Here, a misconstruction causes the antitrust laws to be overridden at the expense of competition and causes Petitioner Cities to be hurt.**

Texas' regulatory scheme is a far cry from the passive regulatory schemes condemned in *Ticor*).

There are tensions between the state action doctrine of *Parker*, the Congressional mandate of antitrust enforcement and the principles of federalism: the enforcement of *Midcal's* two-prong test is intended to ameliorate this tension. Strict adherence to *Midcal* can help ensure that, except where there is a considered decision by the states to substitute regulation for competition, the antitrust laws are applied. The carving out of an exception to *Ticor* and *Midcal* any time state legislation is involved will exacerbate the tensions, because it will allow for conduct violative of the antitrust laws whenever a private interest is sufficiently powerful to "capture" a state legislature. The result will be to allow private parties to secure preferential legislation eliminating competition, regardless of its consistency with the antitrust laws. The implication of preferential legislation on the principle of federalism and antitrust enforcement was commented on persuasively in John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986). *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (upholding antitrust liability where defendants engaged in a prohibited boycott at the suggestion of government officials that was designed to influence government).[15]

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[15] Based upon an analysis of numerous antitrust cases Professor Wiley has concluded that although *Parker* is designed to protect valid state regulatory authority, as an operative matter its "sweeping protection of state authority has not endured." John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 719 (1986). He counts eight cases of this Court after *Parker* that "have subjected to federal antitrust review local practices that represented 'state policy' in the sense that one concerned with local autonomy would use the term." *Id.* at 719-20. His conclusion is that a better framework for analysis would be to inquire whether the state's insulating conduct involves government regulation or private benefit legislation. *Id. See also* Professors Areeda and Turner's suggestion that in *Parker* cases the courts have been balancing state and federal interests. Phillip Areeda and Donald F. Turner, *Antitrust Law.* ¶215(c) (1978) (Supp. 1993).

Review is warranted of the lower courts' creation of a significant exemption to the *Ticor* and *Midcal* holdings. The contrary conclusion will encourage private legislation and economic balkanization and indeed will create pressure on state legislatures to grant exemptions at the behest of parochial local interests.[16]

A separate reason for granting *certiorari* in this case stems from the importance of the electricity industry. The electric power industry is perhaps our nation's largest industry, has a pervasive impact on our economy, and provides an essential product to virtually every American. It is often assumed that the electric industry is totally monopolized and that there is little room for competition. However, to the contrary, numerous courts, agencies, commentators and economic studies have found that both wholesale and retail competition may exist, even in the face of territorial limitations on service, so that a decision based on the presumption of the inapplicability of competition cannot stand. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *City of Mishawaka, Ind. v. American Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). *See also Consumers Power Co.* (Midland Units 1 and 2), 6 N.R.C. 892 (Appeal Board 1977) (reviewing antitrust law affecting the electric power industry). *See also* Dr. Wilson's affidavit. (145a-157a). It is noteworthy that the California Public Service Commission has ordered that large electric users will have a choice of electric suppliers beginning in 1996 and every residential

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For different reasons, Professor Wiley and Professors Areeda and Turner suggest based on analysis, that the *Parker* test is not being applied and needs review. In his concurring opinion in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. at 2180 (J. Scalia, concurring), Justice Scalia suggests the same conclusion.

[16] To the extent that the courts below seek to protect states' abilities to enact substantive economic legislation, Petitioners do not disagree. However, considering that the state action doctrine immunizes conduct that is otherwise illegal under federal antitrust law, claims that courts should not look at whether the state in fact reviewed or supervised the conduct to be protected cannot stand. *See Ticor*, 112 S. Ct. 2169.

electric customer will have such a choice by the year 2002. *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation*, Case R. 94-04-031, I. 94-04-32, — CPUC — (April 20, 1994). The State of Michigan has ordered a "retail wheeling experiment" to assess the benefits and harms of increased retail competition. *Association of Businesses Advocating Tariff Equity ("ABATE") v. Detroit Edison Co.*, Case NU-10143, *et al.* — MPSC — (April 11, 1994).

Petitioners submit that this Court should not, without review, leave standing decisions that seriously threaten retail competition in an industry where further competition is emerging and where the actions of the private parties to secure antitrust exemptions, and of the state to ratify them, fall totally outside the antitrust laws and the governing principles established by this Court. Here, the state could have established articulate principles to limit retail electric competition with adequate supervision of departures from competitive norms, but it did not.

Various states and municipalities have regulatory regimes limiting electric retail competition. *See, e.g., Gainesville Utils. Dep't. v. Florida Power & Light Co.*, 573 F.2d 292. However, almost uniformly, these schemes are supervised by a state regulatory agency to ensure conformance to public policy. Absent correction by this Court, it can be anticipated that additional utilities will seek legislative approval to, in effect, do their own regulating.

An additional reason for granting *certiorari* in this case stems from this Court's decision in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344. In *Columbia*, this Court held that the "co-conspirator" doctrine did not provide grounds for exemption from *Parker*, but the Court reaffirmed that states may not merely ratify private party antitrust actions and the viability of the *Midcal* doctrine. The corollary to this Court's decision in

Columbia is that the *Ticor-Midcal* tests will be strictly applied. Otherwise, as has happened in Alabama, an invitation will be given for governments to condone antitrust violations and for private parties to seek government protection of their illegal acts.

Finally, *certiorari* should be granted to make clear that the state cannot provide parties with a state action shield to antitrust enforcement when parties have failed to comply with the very law that purportedly creates the shield. Otherwise, a party can defend against antitrust claims on the basis of a state statute with which the party has failed to comply.[17]

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[17] The Territorial Acts provide that affected parties exchange service area maps, but the Cities allege that this never occurred. This failure allows APC/Coops to draw maps after the fact or worse to allocate customers at will—a practice clearly contrary to the antitrust laws and their enforcement.